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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RASHAD MANN,

Defendant and Appellant.

D040341

(Super. Ct. No. SCS165116)

APPEAL from a judgment of the Superior Court of San Diego County, Jesus Rodriguez, Judge. Affirmed.

Rashad Mann entered a negotiated guilty plea to assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))<sup>1</sup> and admitted a strike prior (§§ 667, subds. (b)-(i), 668, 1170.12)). The court denied a motion to dismiss the strike prior and sentenced him to prison for four years: double the two-year lower term for assault with a deadly weapon

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<sup>1</sup> All statutory references are to the Penal Code.

with a strike prior. Mann contends the trial court erred in denying his motion to dismiss the strike prior.

## FACTS

Before 1996, Armando Franco had been an "Imperial" gang member. Since he left the gang, current gang members have told him to stay out of Imperial Beach. On December 27, 2001, Franco pulled up in front of his mother's home in Imperial Beach. Rudy Nissen, a current Imperial gang member pulled up behind him. Nissen was talking on a cellular telephone with Mann, who Franco identified as a high-ranking member in the Imperial gang. Nissen handed Franco the telephone and Mann told Franco he owed for being in Imperial territory. Franco handed the telephone to Nissen and Mann told Nissen to take Franco's cellular telephone. Nissen demanded Franco's telephone. Franco refused to give it. Nissen hit and stabbed him, causing a wound that was four to five inches deep.

In 1994, when Mann was 16 years old, the juvenile court entered a true finding he committed assault with a deadly weapon causing great bodily injury. (§ 12022.7.) Later that year, the juvenile court found Mann had twice violated conditions of probation. In 1995, Mann was arrested for being drunk in public. (§ 647, subd. (f).) In 2002, he was convicted of the present crime and admitted the 1994 conviction was a strike prior. (§§ 667, subds. (d)(1) & (d)(3), 667.5, subd. (c)(8), 1192.7, subd. (c)(8).)

## DISCUSSION

Mann argues the trial court abused its discretion in refusing to dismiss the strike prior since he is not a recidivist within the three strikes law. We disagree. Section 667,

subdivision (c) provides that the more stringent punishment set out in the three strikes law applies to a defendant "convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions as defined in subdivision (d)."

Subdivision (d) provides that the three strikes law applies to felony convictions or juvenile court true findings for crimes listed in section 1192.7, subdivision (c) and section 667.5, subdivision (c). Because Mann has a juvenile true finding within these sections, he falls within the three strikes law.

Although a defendant's prior record places him within the three strikes law, the trial court has the power to dismiss a strike prior in the furtherance of justice. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530.) Whether to dismiss a prior strike is in the trial court's discretion. (*Id.* p. at 530.) In ruling whether to dismiss a strike prior the trial court must consider whether, "in light of the nature and circumstances of his present [criminal activity] and prior serious and/or violent felony convictions . . . the defendant may be deemed outside the scheme's spirit . . . and hence should be treated as though he had not [committed] one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Here, in 1994, about eight years before the current crime, the juvenile court found Mann committed assault with a deadly weapon and inflicted great bodily injury on the victim. Later that year, the court entered true findings that Mann violated the terms of probation on two occasions. A year later, Mann was arrested for being drunk in public. He still appears to be active in the gang and uses his gang position to inflict severe violence. The court abuses its discretion only when acting arbitrarily or in a capricious

manner. (*People v. Jordan* (1986) 42 Cal.3d 308, 316.) Here, the trial court was not arbitrary or capricious in finding that Mann does not fall outside the scheme of the three strikes law.

#### DISPOSITION

The judgment is affirmed.

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HUFFMAN, Acting P. J.

WE CONCUR:

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NARES, J.

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AARON, J.